



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert E. Corbin

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ARIZONA ATTORNEY GENERAL

April 5, 1985

The Honorable Wayne Stump  
State Capitol - Senate Wing  
1700 West Washington  
Phoenix, Arizona 85007

Re: I85-048 (R85-040)

Dear Senator Stump:

You have asked a series of questions regarding a citizen's arrest. Your specific questions are:

1. When is it a citizen's right or duty to make a citizen's arrest?
2. What is the proper and correct procedure for a citizen to make a citizen's arrest?
3. Is an employee of Arizona or the United States government immune to a citizen's arrest if in the performance of his official duties he commits theft by extortion?
4. Is the procedure that a citizen must use in making a citizen's arrest for a felony (such as extortion of government employee) any different than if the subject being arrested were a private citizen?

There are no statutes in this country that impose a duty upon a citizen to make an arrest. M. Cherif Bassiouni, Citizen's Arrest 8 (1977). The power of a private citizen to place someone under arrest was part of the common law. 6A

C.J.S. Arrest § 4-15 (1975); Wharton's Criminal Procedure § 61-65, Vol. I (12th ed. C. Torcia 1974). That authority has been codified in A.R.S. § 13-3884 which provides:

A private person may make an arrest:

1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.

2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.

Arrests under this statute are extremely rare. The statute has been used to justify arrests by store security personnel. State v. Sorrell, 95 Ariz. 220, 388 P.2d 429 (1964). It has also been used to justify arrests by law enforcement personnel who might otherwise have been acting outside of their jurisdiction. State v. Goldberg, 112 Ariz. 202, 540 P.2d 674 (1975) (citizen's arrest by federal fish and wildlife agents for possessing marijuana for sale held valid); State v. McCullar, 110 Ariz. 427, 520 P.2d 299 (1974) (Denver police officers make valid citizen's arrest in Phoenix for possession and sale of marijuana).

A person who effects an improper citizen's arrest may himself be charged with a crime. See State v. Barr, 115 Ariz. 346, 565 P.2d 526 (Ct.App. 1977) (upholding conviction for voluntary manslaughter over claim that shooting was justified in order to stop a fleeing felon). A person making an improper citizen's arrest may be held liable in a tort action. See Gortarez v. Smitty's Super Valu, Inc., 140 Ariz. 97, 680 P.2d 807 (1984) (civil suit by arrestee for false arrest, false imprisonment and assault and battery stemming from citizen's arrest); Grant Food, Inc. v. Scherry, 444 A.2d 483 (Md.App. 1982) (citizen attempting to make arrest may be liable for negligent acts toward innocent third party). Should the facts indicate that a person making a citizen's arrest was acting under color of state law, then recovery from the person making the arrest under cause of action for violation of civil rights is also possible. Annot., Actionability Under 42 U.S.C.S. § 1983, Of Claims Against Persons Other Than Police Officer For Unlawful Arrest or Imprisonment, 44 A.L.R.Fed. 225 (1979).

The few Arizona cases construing the language of A.R.S. § 13-3884 suggest that the courts narrowly construe that statute. In Gortarez v. Smitty's Super Valu, 140 Ariz. at 102, 680 P.2d at 812 the court indicated that the privilege to arrest for misdemeanors under A.R.S. § 13-3884(1) is limited to those acts which constitute a breach of the peace and that a mistaken belief that a breach of the peace has been committed is insufficient. The court further noted that shoplifting does not involve a breach of the peace; therefore, there was no valid citizen's arrest for shoplifting. The phrase committed "in his presence" that appears in A.R.S. §§ 13-3884(1) has been held by another jurisdiction to mean that the arrestor observes acts which are themselves sufficiently indicative of a crime in the course of commission. People v. Olquin, 528 P.2d 234, 236 (Colo. 1974). Physical proximity to the offense alone is insufficient. 6A C.J.S. Arrest at 22.

The interpretation of A.R.S. § 13-3884(2) is equally restrictive. In State v. Barr, 115 Ariz. at 349, 565 P.2d at 529, the court pointed out that a private person's authority to make arrests is much more limited than a police officer's. A private person may not arrest on probable cause, but only where "a felony has been in fact committed." A.R.S. § 13-3884(2). That means if no felony was committed, an arrest by a private person is illegal. 115 Ariz. at 349, 565 P.2d at 529. What constitutes reasonable cause to believe that the person to be arrested has committed the felony will undoubtedly turn on the facts of each case. See State v. Goldberg; State v. McCullar. In sum, all of the foregoing authorities suggest that courts do not encourage citizen's arrests.

In response to your second question, an arrest may be made at any time of the day or night. A.R.S. § 13-3882. The Arizona statutes discuss the right of the private citizen making an arrest to break into or out of a building when making such an arrest. A.R.S. §§ 13-3892 through 3894. There are no cases construing those statutes. Statutes also cover the arresting person's right to disarm the arrestee and to recapture a fleeing arrestee. See A.R.S. §§ 13-3895 and 13-3896. Again, no case law illuminates these statutes. Of particular import to your inquiry are A.R.S. § § 13-3889 and 3900 which provide:

A private person when making an arrest shall inform the person to be arrested of the intention to arrest him and the cause of the arrest, unless

he is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the person making the arrest has opportunity so to inform him, or when the giving of such information will imperil the arrest.

A.R.S. § 13-3889. A.R.S. § 13-3900 states:

A private person who has made an arrest shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest was made, or deliver him to a peace officer, who shall without unnecessary delay take him before such magistrate. The private person or officer so taking the person arrested before the magistrate shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested. If, however, the officer cannot make the complaint, the private person who delivered the person arrested to the officer shall accompany the officer before the magistrate and shall make to the magistrate the complaint against the person arrested.

There are few Arizona cases directly interpreting these statutes. The validity of the arrest does not turn upon the words used by the private person in explaining the reason for the arrest. State v. DeSanti, 8 Ariz.App. 77, 80, 443 P.2d 439, 442 (1968). However, adherence to these procedures may determine the validity of the arrest. Compare State v. Sorrell, 95 Ariz. 220, 388 P.2d 429 (1964) (arrest valid where department store detective stopped defendant immediately, identified herself and asked for the stolen goods) with McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (Utah, 1984) (private arrest invalid where store security officer failed to immediately give notice of intention, cause and authority to arrest). What constitutes sufficient notice to the arrestee will depend on the facts of each case. 6A C.J.S. Arrest § 48 at 112 (1975). Of course, the use of physical force in making an arrest is very limited by both case law and statute. State v. Barr, 115 Ariz. 346, 565 P.2d 526 (Ct.App. 1977); A.R.S. §§ 13-409 and § 13-3881.B.

You have also asked whether an employee of Arizona or the United States government is immune to a citizen's arrest if in the performance of his official duties he commits theft by extortion. Theft by extortion is a felony. A.R.S. § 13-1804.B. However, a governmental employee who is acting in the course and scope of his duties would not by definition be committing theft by extortion. A.R.S. § 13-402 provides:

A. Unless inconsistent with the other sections of this chapter defining justifiable use of physical force or deadly physical force or with some other superseding provision of law, conduct which would otherwise constitute an offense is justifiable when it is required or authorized by law.

B. The justification afforded by subsection A also applies if:

1. A reasonable person would believe such conduct is required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; or

2. A reasonable person would believe such conduct is required or authorized to assist a peace officer in the performance of such officer's duties, notwithstanding that the officer exceeded the officer's legal authority.

See also Ariz. Atty. Gen. Op. 182-022. Thus, a government employee who, for instance, collects taxes or registration fees as required by federal or state law would not be committing theft by extortion if the collection of these monies was authorized by federal or state law.

If, while acting outside the course and scope of his duties, a government employee commits extortion, the employee would generally not be exempt from arrest in criminal cases. 5 Am. Jur. 2d Arrest § 102 at 785 (1962). There appears to be no constitutional or statutory provision in Arizona contrary to this general principle. Our research did not reveal any case where a government employee was placed under citizen's arrest while in the performance of his or her duties.

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Finally, in answer to your last question, the Arizona statutes do not set up a separate procedure for a citizen's arrest of a government employee. Nor do the general treatises on the subject suggest any special procedures for a citizen's arrest of any particular class of people.

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN  
Attorney General

BC:DMR:scl